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No. 85-2168

IN THE

Supreme Court of the United States

October Term, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

MOTION OF THE PHILADELPHIA INQUIRER AND CAPITAL CITIES/ABC, INC. FOR LEAVE TO FILE BRIEF, AS *AMICI CURIAE*, WITH BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF VIRGINIA

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The proposed *amici curiae* respectfully move this Court for permission to file the attached brief in support of the petition for a writ of *certiorari* in this action.

Petitioner's written consent, by Eric Schnapper of the NAACP Legal Defense and Education Fund, Inc. is being filed herewith. However, this motion is necessitated because Respondent's consent to file, although requested, has not been received.

The amici are leading media organizations. They have an interest in supporting the petition because they have themselves either been the subjects of excessive libel damage awards or they could be subject to such awards in the future. All too frequently, in recent years, questionable libel judgments have also imposed grossly excessive damage awards. See Appendix A and Appendix B to the accompanying brief. Amici believe that the final enforcement of such judgments and awards would

"constitute a forbidden intrusion on the field of free expression."

While the petition they support involves a "non-media" libel defendant, amici are nonetheless concerned about a case which they believe presents the spectre of a constitutionally-suspect libel judgment, imposing an excessive damage award, left unremedied -- indeed left largely unreviewed -- by the court below.

In the past, lower state and federal appellate courts have often, but not always, performed well their constitutional mandate to prevent the imposition of constitutionally-impermissible libel judgments. However, when courts of inferior jurisdiction fail in that mission -- as amici believe happened here -- this Court must stand ready to exercise its

power of certiorari review so that errors of constitutional dimension are not left uncorrected.

The amici believe their brief can be of assistance to the Court in identifying the errors amici have concluded inhere in the judgment below. Amici also wish to alert this Court to the urgent need for certiorari oversight in order to assure that speech on issues of undoubted public concern is not unconstitutionally abridged by the enforcement of clearly erroneous libel judgments imposing excessive and "chilling" libel damage awards.

Accordingly, the proposed amici curiae respectfully request that this Court grant them permission to file the attached brief in support of the petition for a writ of certiorari to the Supreme Court of Virginia.

Respectfully submitted,

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TABLE OF CONTENTS

Legal and Factual Background 1

POINT I - 9
Petitioner's Charge of Racism Was the Kind of Rhetorical Hyperbole that Is Not Actionable Under the Common Law or the First Amendment

POINT II - 16
The Finding of Actual Malice Was Based on a Constitutionally-Improper Standard and Analysis

POINT III - 23
The Damage Award Violates the First Amendment

A. An Award Approaching $250,000 is Grossly Excessive Under the Circumstances 23

B. The Compensatory Award Violates Constitutional Limitations on Actual Damages in Libel Actions . . . 25

C. The Punitive Damage Award Also Violates the First Amendment 28

D. Libel Awards Violative of the First Amendment Should Be Reversed and Not Merely Remitted 34

POINT IV - 37
The "Independent" Review Required in Constitutional Libel Actions Mandates Grant of the Petition on All Three Issues

A. An Erroneous Actual Malice Finding Should Be Reviewed . . 37

B. The Failure to Consider a Question of Constitutional Dimension, Such as First Amendment Protection for Hyperbole, Mandates Review by this Court 40

1. Protection of Hyperbole is a First Amendment Interest Requiring Independent Review 40

2. In Granting the Petition the Court Need Not Delineate the Full Contours of Constitutional Protection for Statements of Opinion. .42

C. Certiorari Should Be Granted to Prevent the Imposition of Excessive and Unconstitutional Libel Damage Awards 43

Conclusion 45

Appendix A - A-1
Recent Trends in Libel Damage Awards Against the Media

Appendix B - B-1
Recent Million-Dollar Awards in Media Libel, Privacy and Related Cases and their Disposition

TABLE OF AUTHORITIES

Cases

Abrams v. United States, 250 U.S. 616 (1919)..... 34

Aetna Life Insurance Co. v. Lavoie, 106 S.Ct. 1580 (1986).....29

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967).....21

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).....5
17, 18, 40

Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293 (1943).....15

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).....17, 29, 30

Dun & Bradstreet v. Greenmoss Builders, 86 L. Ed. 2d 593 (1985)..9, 31

Garrison v. Louisiana, 379 U.S. 64 (1964).....17, 18

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974).....2, 3, 4, 22,
25, 26, 31, 32,
38

Greenbelt Cooperative
Publishing Association, Inc.
v. Bresler, 398 U.S. 6 (1970).....2, 14,
15, 21, 41

Hotchner v. Castillo-Puche,
551 F.2d 910 (2d Cir. 1976),
cert. denied sub. nom.
Hotchner v. Doubleday & Co.,
434 U.S. 834 (1977).....22

New York Times Co. v.
Sullivan, 376 U.S. 254 (1964)...1, 2, 5,
29, 32

Old Dominion Branch No. 496,
National Association of
Letter Carriers v. Austin,
418 U.S. 264 (1974).....2, 15

Ollman v. Evans, 105 S.Ct. 2662
(1985).....42

Philadelphia Newspapers,
Inc. v. Hepps, 106 S.Ct. 1558
(1986).....10

Rosenbloom v. Metromedia,
Inc., 403 U.S. 29 (1971).....30, 31, 38

St. Amant v. Thompson, 390
U.S. 727 (1968).....4, 17, 18

Time, Inc. v. Hill, 385 U.S.
374 (1967).....3

Other Authorities

Franklin, Foreword: Five Years of Cases at the Supreme Court Door - A Look at the Quiet Side, LDRC 50-State Survey 1985-86: Current Developments in Media Libel and Invasion of Privacy Law (Libel Defense Resource Center 1986).....44

Restatement (Second) of Torts §566 (1977).....13, 14

Van Alstyne, First Amendment Limitations on Recovery from the Press, 25 Wm. & Mary L. Rev. 793 (1984).....36

Factual and Legal Background

In pursuing the difficult and sensitive task of balancing the competing interests of freedom of expression and protection of reputation this Court has, over the past two decades, wisely recognized several fundamental First Amendment principles pertinent to its consideration of this petition. It has held that "uninhibited, robust, and wide-open ... debate on public issues" represents a "profound national commitment" which must be protected and that such debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks ...," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); that "under the First Amendment there is no such thing as a false idea" and

that "however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas," Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); that "debates about controversial issues" are often "heated" and that, under the First Amendment, obvious "rhetorical hyperbole," "vigorous epithet" and "lusty ... expression of contempt" are to be expected, must be protected and need not be "tone[d] down," Greenbelt Cooperative Publishing Association, Inc. v. Bresler, 398 U.S. 6, 13-14 (1970); Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 285-86 (1974); that "the fear of [libel] damage awards ... may ... markedly ... inhibit ..." free expression, New York Times v.

Sullivan, supra, 376 U.S. at 277, and that "fear of large verdicts in damage suits ... must inevitably cause publishers to 'steer ... wider of the unlawful zone' ... and thus 'create the danger that the legitimate utterance will be penalized,'" Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); that "the largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms" and that, therefore, the Constitution precludes "gratuitous awards of money damages ... in excess of actual injury," Gertz v. Robert Welch, Inc., supra, 418 U.S. at 349; that because "juries assess punitive damages in wholly unpredictable amounts

... [a]nd [jurors] remain free to use their discretion selectively to punish expressions of unpopular views ... unnecessarily exacerbat[ing] the danger of ... self-censorship," therefore "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," id. at 349, in the sense that defendant "in fact entertained serious doubts as to the truth of his publication," St. Amant v. Thompson, 390 U.S. 727, 731 (1968)(emphasis added); finally, in order to assure that all of these fundamental First Amendment concerns are not violated in adjudicating a libel claim, that this Court -- and the lower state and federal courts -- "must 'make an independent examination of the

whole record' ... so as to assure ... that the judgment does not constitute a forbidden intrusion on the field of free expression," New York Times Co. v. Sullivan, supra, 376 U.S. at 285 (emphasis added); see also Bose Corp. v. Consumers Union of the United States, 466 U.S. 485 (1984).

Amici are constrained to conclude, on the very face of the Petition and Appendix, that each of these fundamental principles has either been violated, or would be placed in jeopardy, by the judgment below. Petitioner's publication, labelling as "racism" white opposition to a black real estate development project, would seem no more than the kind of "vehement, caustic and sometimes unpleasantly sharp attack" that is to be expected as a part of the

"uninhibited, robust and wide-open debate on public issues"; petitioner's strong -- albeit perhaps intemperate -- personal views about his opponents would seem no more than the expression of an "opinion ... however pernicious" that should be answered or corrected through "the competition of other ideas" and not by means of the imposition of coercive libel judgments; petitioner's vituperative language, of the kind often bandied about in disputes between different racial groups, would seem no more than an expected part of the "heated ... debate ... about controversial issues" that often entails the use of obvious "rhetorical hyperbole," "vigorous epithet" and "lusty ... expression of contempt;" an almost quarter-million dollar damage award against an

individual would "inevitably cause" future speakers to "steer ... wider" of this newly created "unlawful zone" -- i.e., the passionate charge of "racism" based upon public positions perceived as unfavorable to blacks or other minority groups -- and will "create the danger that the legitimate utterance will be penalized" or chilled; a compensatory damage award approaching $75,000, based upon findings summarized in Point III B., infra, represents the kind of "gratuitous" award "in excess of actual injury" that "unnecessarily compounds the potential of [libel] to inhibit the vigorous exercise of First Amendment freedoms"; a punitive damage award approaching $200,000, based upon the findings summarized in Point III C., infra, would also violate petitioner's constitutional rights;

finally, the lower court's failure at all to consider the issue of rhetorical hyperbole and its failure adequately and correctly to review the issues of actual malice and damages, would also violate petitioner's right to an "independent" review of issues of constitutional dimension. (See Points I and II, infra.)

It is for these reasons that amici submit this brief in support of the petition. They do so in order to assist this Court in identifying the errors amici believe inhere in the judgment below. Amici also wish to alert this Court to the urgent need for certiorari oversight -- in both "media" and "non-media" libel actions -- to assure that speech of undoubted public concern is not unconstitutionally abridged by the enforcement of clearly

erroneous libel judgments and by the imposition of excessive and "chilling" libel damage awards.

POINT I - Petitioner's Charge of Racism Was the Kind of Rhetorical Hyperbole that Is Not Actionable Under Either the Common Law or the First Amendment

By and large established media publications do not indulge in the kind of highly personal rhetoric at issue in this case, although they are not infrequently called upon to report such charges made by others.* Moreover,

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* In this section, and those below, it is assumed that a majority of this Court may be of the view that there is no difference in constitutional libel law between media and non-media defendants, at least as to matters of obvious public concern such as those involved in this case. Compare Dun & Bradstreet v. Greenmoss Builders, 86 L.Ed.2d 593, 618-19 (1985) (Brennan, J., dissenting)

(footnote continued)

even the most responsible journalism presents editorials and commentary that may include strong and at times one-sided argumentation. Amici are concerned that the judgment of the courts below, in penalizing vehement and opinionated rhetoric,* fails to give due regard, and sufficient protection, to such ideas and expression.

This Court has wisely recognized

(footnote continued)

with Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1565 n.4 (1986) (O'Connor opinion) and with 106 S.Ct. at 1565-66 (1986) (Brennan, J. with whom Blackmun, J. joined, concurring.)

* For purposes of this brief, the broad term hyperbole is used to encompass epithets, disparaging and abusive words or charges and all other exaggerated rhetoric that, based on the context of their use, obviously express their author's opinions, beliefs, or predilections and cannot reasonably be understood as statements or assertions of fact.

that the First Amendment demands the greatest care in evaluating the context and significance of expression sought to be made the basis for prescription or sanction as libelous utterance. Unfortunately, the court below failed to apply such "sensitive tools" to this constitutionally-mandated task of examining the contextual implications of petitioner's charge of "racism." The court below also failed to appreciate the startling implications for freedom of expression of its holding that an angry charge of "racism" is actionable in defamation.*

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* Only one judge in the court below, on a prior appeal, appeared to understand the need for a sensitive and at the same time common-sense approach to the meaning and implications of petitioner's publication. As Judge Harrison wisely noted: "The words 'racism' and 'racist' are bandied about in our society with complete abandon. People of all races

(footnote continued)

It is difficult, in amici's view, to square the proscription of such rhetorical hyperbole -- involving some of the most passionately held feelings and beliefs of competing racial groups -- with the robust freedom of expression guaranteed by the First Amendment.

Even under strict common law principles, there was no need to reach this result. When -- as here -- a publication sets forth the facts on which its rhetorical conclusions are based -- however meagre one might consider the facts and however

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(footnote continued)

currently utilize these terms to voice their innumerable real and imagined grievances. Indeed, it would not be difficult to find a newspaper which contains a complaint by one party against another for some action allegedly grounded in 'racism,' or 'reverse racism.'" Appendix to the Petition for Certiorari at 30 (hereinafter "Pet. App. __").

questionable one might find the conclusions from a more disinterested perspective -- such a publication has long been held to be protected from a claim of defamation. See, e.g., Restatement (Second) of Torts §566 comment c, illustration 4 (1977).

In such cases, the reader or listener is considered perfectly capable of evaluating the bases, or lack thereof, for the charges being made and of understanding the hyperbolic nature of the publication. The common law recognizes that even argumentative, unreasonable or intemperate opinions are entitled to be formed, and that their expression is equally protected. Relatedly, the common law has long considered obvious hyperbole and vituperation to be privileged because "a certain amount of vulgar name-calling is

frequently resorted to ... and it is properly understood by reasonable listeners to amount to nothing more." Id. §566 comment e.

Similar principles have been adopted by this Court as constitutionally-based limitations on libel actions. In Greenbelt Cooperative Pub. Assoc. v. Bresler, 398 U.S. 6 (1970), a case that also involved biting public debate over a proposed real estate development, this Court held that such hyperbolic characterizations must be absolutely protected as a matter of First Amendment law. In Greenbelt, the epithet "blackmail" had been leveled at a real estate developer. This Court held "that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken and not libel when reported." Id. at 13. In

such context -- a public debate over pending land negotiations -- "even the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." Id. at 14 (emphasis added). Accord, Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974) (holding that use of the epithet "traitor" in the context of a labor dispute was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join."). See also Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 295 (1943) (protecting, in a

non-libel action, a charge during World War II that a business was "aiding the cause of Fascism;" holding that such hyperbolic characterization must be distinguished from the "falsif[ication of] facts" and merely reflects "loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies ...")

POINT II - The Finding of Actual Malice Was Based on a Constitutionally-Improper Standard and Analysis

It is settled law, established in a long and unbroken line of decisions by this Court, that "actual malice," for purposes of constitutional libel actions, must be evaluated on the basis of a "<u>subjective</u>" standard. The focus

of the subjective standard is upon the state of mind of the libel defendant at the time of publication. That is, whether the defendant actually knew the publication was false, or else whether the defendant published a falsehood "with a high degree of awareness of its probable falsity," in the sense that the defendant had "in fact entertained serious doubts as to the truth of his publication," Garrison v. Louisiana, 379 U.S. 64, 74 (1964); St. Amant v. Thompson, supra, 390 U.S. at 731 (emphasis added). See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967) (plaintiffs must "prove that the publication ... was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity"); Bose Corp. v. Consumers Union, 466 U.S. 485, 511 n.30

(1984) (defendant must have "realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness, at the time of publication") (emphasis added).

In adopting this specifically subjective standard, this Court has expressly rejected an "objective," or "reasonable conduct," test. "The reasonable-belief standard ... is not the same as the reckless-disregard-of-truth standard." Garrison v. Louisiana, supra, 379 U.S. at 79. See also St. Amant v. Thomson, supra, 390 U.S. at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published..."); Bose Corp. v. Consumers Union, supra, 466 U.S. at 513 (actual malice is not established "simply because an intelligent speaker would have to know

that the term is inaccurate...").

The court below violated these settled principles, an error of clear constitutional dimension. It expressly applied an objective standard in its review of the actual malice finding. "[E]valuation of this element of proof," the court held, "must be from an objective standpoint, not merely from a subjective perspective." (emphasis added)(Pet. App. 101-02) The court thereupon evaluated petitioner's publication in terms of such allegedly "objective" criteria focusing largely on those elements petitioner had labelled as "racism." It found that petitioner had acted unreasonably because "he accused [respondent] of racial prejudice without any objective basis for the charge;" because he "had no proper grounds to suppose" that

respondent "was oppressing other individuals;" and because he "recklessly stated that [respondent's] opposition to [petitioner's] development on pollution grounds was a 'sham' to conceal his supposed real purpose, i.e., oppression of black citizens..." (emphasis added)*

The court completely failed to identify or discuss petitioner's subjective state of mind in relation

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* The court below also considered as evidence of actual malice statements made about respondent's "tenured" university professorship and the suggestion that such a professorship was "living off the 'public dole' at the expense of working people." (Pet. App. 102) It is hard to understand how such statements do not represent fair and protected commentary based upon the undisputed fact of respondent's tenure at a public university. The court also considered as pertinent to actual malice what it found was petitioner's motive "to intimidate [respondent] in order to eliminate the voice of a

(footnote continued)

to the charge of racism. It did not find that defendant was in fact aware of the falsity of the charge or that he realized it was in error; nor did the court point to any evidence that would have formed a basis for such findings.

Finally, as discussed in Point I, supra, the court failed adequately to consider whether the charge of "racism," and the underlying statements surrounding that charge, were protected rhetorical hyperbole. Nor did it find that the charge of "racism" was an opinion not actually held by the

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(footnote continued)

leading opponent." (Id.) This holding also defies a principle long settled by this Court that equating a libel defendant's spite, hostility, ill-will or desire to injure the plaintiff with actual malice is an "error of constitutional magnitude." Greenbelt Publishing Co. v. Bresler, supra, 398 U.S. at 10; Beckley Newspapers Corp. v. Hanks, 391 U.S. 81, 82 (1967).

petitioner. Its affirmance of the punitive damage award, thus premised on such protected statements, also necessarily erred in failing to identify a false statement of fact published with actual malice, for by definition actual malice cannot be established regarding opinions and beliefs. "[T]here is no such thing as a false idea." Gertz v. Robert Welch, Inc., supra, 418 U.S. at 339. And, as the Second Circuit has wisely observed, "[a]n assertion that cannot be proven false cannot be held libelous." Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1976), cert. denied sub. nom. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977).

POINT III - The Damage Award Violates the First Amendment

A. An Award Approaching $250,000 is Grossly Excessive Under the Circumstances

Amici ask this Court to take notice of disturbing trends in libel damage awards over the past several years, some of which are charted and summarized in Appendix A and Appendix B hereto. Particularly in light of these trends, amici submit that the Court should be prepared to exercise its power of review in order to assure that excessive libel awards are not upheld and that sufficient legal constraints are recognized so as to prevent the chilling effects of such awards in future cases.

While the greatest excesses in libel damage awards may have been experienced by media libel defendants, this

escalation of libel damages can also impact severely on all libel defendants, including private citizens such as petitioner. Indeed, an award of nearly a quarter of a million dollars can be as monstrously out of proportion to an individual's circumstances and culpability as are the million and multi-million dollar libel awards that are today regularly being assessed by juries against corporate, media defendants.

The courts below also failed to take into account that this onerous award was also unnecessary, at least in the sense that plaintiff was apparently not without the means to remedy any threatened injury by the constitutionally-preferred antidote to one-sided expression. First Amendment freedoms could not long survive were every subject of an intemperate remark

to hale his opponents into the courts in defamation actions, thereby imposing all of the attendant costs of litigation, rather than simply answering the charges made in the context of open public debate.

B. The Compensatory Award Violates Constitutional Limitations on Actual Damages in Libel Actions

It is against this background that the damages awarded to the respondent must be assessed. From that perspective the conclusion is unavoidable, amici submit, that the award violates constitutional limitations previously recognized by this Court.

In Gertz v. Robert Welch, Inc., supra, 418 U.S. at 323, while the Court acknowledged that states have a legitimate interest in compensating for defamatory falsehoods, it also held that

this interest reaches no farther than compensation for actual injury. Only in this manner can the "largely uncontrolled discretion of juries to award damages where there is no loss" be controlled. And only by this means can the courts avoid "unnecessarily compound[ing] the potential of any system of liability for defama[tion] ... to inhibit the vigorous exercise of First Amendment freedoms." Id. at 349.

In fact, the court below found that the jury in this action had awarded excessive damages where there was no loss. It held that the "compensatory" damage award of $100,000 was "so out of proportion to the damage sustained as to be excessive as a matter of law." It found that respondent "experienced no physical manifestation of any emotional distress ... sought no medical attention

for any condition resulting from the publication ... [and] there was no evidence that Moore's [professional] standing with his peers was diminished." (emphasis added) To the contrary, the court found that respondent "continues to be held in high esteem among his community of friends and colleagues." (Pet. App. 98)

And, finally, although the court did find that respondent may have suffered a certain degree of "embarrassment" and "humiliation" and some "loss of reputation" -- at least among others than his peers, colleagues and community of friends -- it concluded that the jury's verdict bore "no reasonable relation" to whatever lesser damages may have been sustained.

Amici respectfully submit that, in the circumstances, remittitur by a

factor of only one-third, leaving a compensatory award approaching $75,000, violates the constitutional mandate, defined by this Court, to confine compensation to "reasonable" awards for "actual" injury, as opposed to "gratuitous" awards, "far in excess of any actual injury."

C. The Punitive Damage Award Also Violates the First Amendment

This Court has long recognized that the traditional concept of punitive damage awards cannot easily be harmonized with our national commitment to the uninhibited exercise of First Amendment freedoms. The Court's analysis teaches that punitive damages in libel actions are disfavored and, at the very least, that any punitive award

must be carefully scrutinized.*

In New York Times Co. v. Sullivan, this Court made clear that a substantial motivation for any development of constitutional limitations on the common law of libel was the potential chilling effect of the imposition of massive damage awards.**

In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), although the majority affirmed a punitive damage

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* Recently, Chief Justice Burger noted that even in a non-libel action a constitutionally-based challenge to a huge and disproportionate punitive damage award "raise[s] important issues which, in an appropriate setting, must be resolved..." Aetna Life Ins. Co. v. Lavoie, 106 S.Ct. 1580, 1589 (1986).

** It is noteworthy that the award in Sullivan -- against one of the nation's great corporate newspaper publishers -- was not much more than twice as large as the award imposed here.

award, Justice Harlan was careful to note that punitive damages were traditionally strictly limited under common law and that the First Amendment at minimum requires "judicial control over excessive awards ... based on jury prejudice." Id. at 160.

Thereafter, these concerns led to open condemnation of punitive damages by Justices Marshall and Stewart who argued on constitutional grounds, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), for outright elimination of the discretion to impose such exemplary awards.

Even Justice Harlan, who had voted to affirm a punitive award in Curtis Publishing Co. v. Butts, although he did not concur in an across-the-board ban on punitive damages, agreed in Rosenbloom that "substantial punitive

damage awards [are] likely to induce self-censorship," id. at 72, and would have held that punitive damages are:

> "unconstitutional, in a private libel case, ... unconfined by the requirement that these awards bear a reasonable ... relationship to the actual harm done." Id. at 77.*

Finally, of course, these developing concerns led to the outright elimination, in Gertz v. Robert Welch, Inc., supra, 418 U.S. 323, of punitive damages at least in those cases where "the private defamation plaintiff establishes liability under a less

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* Recently, Mr. Justice White made reference to Justice Harlan's views in Rosenbloom in commenting that the limitations on presumed and punitive damages suggested by Justice Harlan might have served as an alternative means of protecting the press from the undue chilling effects of "intimidating damages liability." Dun & Bradstreet v. Greenmoss, supra, 86 L.Ed.2d at 610 (1985) (concurring opinion).

demanding standard than that stated by New York Times. . ." Id. at 350 The basis of this holding, echoing all of the concerns of Justices Marshall, Stewart and Harlan, was the dangerous conflict between awards of punitive damages and the constitutional considerations that underlay New York Times:

> "[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views... [J]ury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship..." Id.

Here, all of the concerns that are reflected in this Court's previous rulings on punitive damages in libel actions are presented. The court below held that the original jury award of

punitive damages was "a forbidden intrusion on the exercise of free expression and [was] substantially in excess of adequate punishment for [petitioner's] conduct." In fact, the award was held to be "not merely punitive, [but] destructive." The court found that the award had no "reasonable relationship to the actual damages sustained and to the measure of punishment required" and held that the punitive award "on its face indicates prejudice or partiality ... and cannot stand." (Pet. App. 105)

Given the court's recognition of these pervasive defects in the original punitive award amici submit that the minimal remittitur it ultimately approved was wholly inadequate to cure these constitutional concerns.

D. Libel Awards Violative of the First Amendment Should Be Reversed and Not Merely Remitted

Although this Court has never expressly so held in the context of a libel damage award, amici respectfully submit that when a jury's initial damage award evidences pervasive defects such as those found by the court below, then the First Amendment requires that the award not simply be remitted, but that it should be reversed outright.

Support for such a holding is found in Justice Holmes' dissenting opinion in Abrams v. United States, 250 U.S. 616 (1919). In that case sentences of twenty years imprisonment had been imposed based upon the author's publication of two leaflets. Justice Holmes, in dissent, would have held that the leaflets were absolutely

protected under the First Amendment. But even assuming that the expression could constitutionally have been punished, Justice Holmes found a separate and equally weighty First Amendment infirmity in the degree of punishment inflicted, "unless," as Justice Holmes put it, "the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow..."

It is constitutionally impermissible, Justice Holmes was suggesting, to impose excessive punishment based not upon the proscribable aspects of the defendant's actions, but rather upon a generalized distaste for the defendant's protected beliefs or manner of expression. Where it is clear that such excessive punishment has been imposed, the

underlying verdict is itself presumptively tainted by an impermissible motive to punish disfavored expression.

As one leading commentator has noted with reference to Abrams and in the specific context of libel damage awards:

> "To the extent that the passion and prejudice of the jury [as reflected in excessive damage awards] reflects an antagonism to the defendant's publication ... libel defense attorneys [ought to be] entitled to a new trial regardless of plaintiff's willingness to accept [a remitted] award .... There is typically no way of determining the extent to which that taint equally affected the jury's determination [of liability] ... and not merely the determination of appropriate damages." Van Alstyne, First Amendment Limitations on Recovery from the Press, 25 Wm. & Mary L.Rev. 793, 807-08 (1984).

POINT IV - The "Independent" Review Required in Constitutional Libel Actions Mandates Grant of the Petition on All Three Issues*

A. An Erroneous Actual Malice Finding Should Be Reviewed

The court below recognized its constitutional obligation independently to review the record, but only with respect to the issues of actual malice and punitive damages. Unfortunately, the court's independent review failed to identify the constitutional error that underlay the punitive damage award.

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* Amici do not address Question 3 of the petition, regarding the racial composition of the juries in this action, which is addressed in the separate amicus curiae brief of the NAACP. Amici note, however, their concern that juries in libel actions may be inclined to substitute emotion for reason, or personal predilection for legal and constitutional limitations, in judging controversial or unpopular expression -- a concern shared by this Court. See, e.g., Gertz

(footnote continued)

When a lower court purports to undertake an independent review of the record regarding the existence of actual malice, but when that review without doubt applies an incorrect legal standard and thereby leaves standing obvious, uncorrected error of constitutional dimension on the very issue mandated for independent examination, then this Court should itself be prepared to exercise its

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(footnote continued)

v. Robert Welch, Inc., supra, 418 U.S.at 350 (juries may "use their discretion selectively to punish ... unpopular views"); Rosenbloom v. Metromedia, Inc., supra, 403 U.S. at 84 (juries may "penalize heavily the unorthodox and the unpopular and exact little from others."). Such First Amendment-related concerns may well be exacerbated when arbitrary or discriminatory factors are permitted to influence the selection of jurors. This would be particularly so when those factors are directly related to the controversial nature of the publication under consideration.

power of certiorari in order to assure that First Amendment rights are held inviolate.

Presumably this Court is not literally bound under the independent appellate review doctrine to review every claim of error involving the actual malice issue in a libel action. However, at least as a prudential matter, this Court should step in when significant error of constitutional dimension is apparent on the face of a libel petition and when a substantial if not excessive libel judgment will otherwise be finally enforced based upon such constitutionally-erroneous findings.

To fail to grant certiorari in such circumstances would violate at least the spirit of Justice Stevens' eloquent recognition for this Court only two

Terms ago that:

> "the requirement of independent appellate review ... reflects a deeply held conviction that judges -- and particularly members of this Court -- must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." (emphasis added) Bose, supra, 466 U.S. at 510-11.

B. The Failure to Consider a Question of Constitutional Dimension, Such as First Amendment Protection for Hyperbole, Mandates Review by this Court

1. Protection of Hyperbole is a First Amendment Interest Requiring Independent Review

In reviewing the judgment, the court below entirely failed to consider petitioner's continuing contention that his advertisement was an expression of opinion protected by the First Amendment. (Pet. App. 51, 265).

The failure even to consider whether a publication involves

protected expression is clearly an error of constitutional dimension. In fact, this Court has expressly applied the requirement of independent review to the necessary and sensitive task of evaluating the meaning of a publication in terms of constitutional protection for rhetorical hyperbole. Greenbelt Pub. Assn. v. Bresler, supra, 398 U.S. at 11-15.

Where a lower appellate court has entirely failed to review such an issue this Court should, at minimum, give the most careful scrutiny to a petition raising a serious claim of constitutional error involving that issue.

2. In Granting the Petition this Court Need Not Delineate the Full Contours of Constitutional Protection for Statements of Opinion

The petition correctly makes note of numerous cases, in the lower state and federal courts, fleshing out the many ramifications of the opinion vs. fact dichotomy in the law of defamation. Amici believe, however, that this case can be resolved without undertaking, as might seem to be invited by the petition, to write an abstract and wide-ranging treatise on what Justice Rehnquist correctly notes has been the "rich and complex history of the struggle of the common law to deal with this problem." Ollman v. Evans, 105 S.Ct. 2662, 2663-64 (1985) (Rehnquist, J. dissenting to the denial of certiorari). As argued in Point I, supra, the narrower ground on which the

petition should be granted, and the judgment overturned, is to be found in the Court's previous recognition of constitutional protection for the specific category of rhetorical hyperbole.

C. Certiorari Should Be Granted to Prevent the Imposition of Excessive and Unconstitutional Libel Damage Awards

Amici respectfully submit that the same First Amendment concerns which require stringent limitations on libel damages also mandate this Court's most careful scrutiny in reviewing a petition that challenges the enforcement of an excessive or otherwise constitutionally-suspect libel damage award. The court below paid lip service to the need to guard against excessive damages, but

ultimately failed to prevent the enforcement of an unconstitutional award. The fact that such an award is now final and will be enforced unless this Court intervenes, weighs heavily in favor of the grant of certiorari at this juncture in order to assure that excessive damage awards are not imposed in violation of petitioner's First Amendment rights.*

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* One leading commentator, in reviewing this Court's actions granting and denying libel petitions over the past several years, has noted with some surprise that the Court denied all of the petitions filed during that period seeking review of final damage awards; instead, each of its grants of certiorari involved non-final judgments. Franklin, Foreword: Five Years of Cases at the Supreme Court Door -- A Look at the Quiet Side, published in LDRC 50-State Survey 1985-86: Current Developments in Media Libel and Invasion of Privacy Law at xxi (Libel Defense Resource Center 1986).

Conclusion

The petition for a writ of certiorari to the Supreme Court of Virginia should be granted and the judgment reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A --

Recent Trends in Libel Damage Awards Against the Media*

(1) The Size of Recent Media Damage Awards

According to the Libel Defense Resource Center the average (mean) initial damage award in eighty-one media libel actions tried between 1980 and 1984 that resulted in a plaintiff's verdict was in excess of $2 million. LDRC Bulletin No. 11 (November 15, 1984) at 18 (Table B-9). Even eliminating the distorting effects of three awards of over $10 million, the average award during this period still exceeded three-quarters of a million

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* Based upon data and analyses prepared and published by the Libel Defense Resource Center (LDRC), New York, New York.

dollars. The average award during a period of several months in 1985, when no eight-figure awards were recorded, was almost $1.8 million dollars. LDRC Bulletin No. 16 (March 15, 1986) at 44.

In terms of the sheer numbers of huge awards, LDRC has reported some thirty libel damage awards at or in excess of $1 million since 1980. See Appendix B, infra. In contrast, only three media libel awards at the million-dollar level were reported in the previous two decades.

In terms of the relative numbers of huge awards, the pace of million-dollar libel damages has also dramatically increased, according to LDRC data. In the pre-Sullivan decade, of thirty-eight libel damage awards initially entered only one was in excess of $1 million -- see Section

(iii), infra. In contrast, in the period 1980-84, almost 25% of the awards in media libel actions exceeded a million dollars. LDRC Bulletin No. 4 (Part 1) (August 15, 1982) at 8-17; LDRC Bulletin No. 11, supra, at 25-34 (listing cases and awards). In the last several months of 1985, more than half of the media libel awards recorded by LDRC exceeded the million-dollar mark. LDRC Bulletin No. 16 (March 15, 1986) at 44.

(ii) Punitive Damage Awards in Recent Media Libel Actions

Almost three out of five of the damage awards recorded by LDRC during the period 1980-84 included an award of punitive damages. More than one-third of those punitive awards was in excess of $1 million. Indeed, the average punitive award in those cases was

substantially in excess of $2.5 million. During the last two years of the period, the average punitive damage award was almost $3 million. In terms of dollars awarded, during the period punitive damages accounted for some 80% of the total amount of damages awarded. LDRC Bulletin No. 11, supra, at 14-15.

(iii) Comparison Data: Average Damage Awards in the Decade Prior to New York Times Co. v. Sullivan

To put these data into further perspective the LDRC recently compiled a historical review of damages awarded in the decade prior to this Court's decision in New York Times Co. v. Sullivan. LDRC found that, in contrast to current trends, the average media libel award during the pre-Sullivan period, excluding the distorting

effects of the single million-dollar award during that entire decade, was under $50,000. LDRC Bulletin No. 17 (July 31, 1986). Indeed, the total amount of the awards in thirty-seven pre-Sullivan media libel cases reporting damage figures (again excluding the single million-dollar verdict) was $1,839,468. This total for thirty-seven cases is less than a single average case in today's world of libel litigation. While adjusting for inflation accounts for some portion of this massive disparity, LDRC reports that even in constant dollars today's media libel damage awards remain between 400% and 500% higher than the pre-Sullivan decade. Id.

(iv) Comparison Data: Media Libel Awards Compared to Damages in Other Areas of Tort Litigation

LDRC has published data comparing

and contrasting these libel trends with damage trends in two other areas of civil tort litigation -- medical malpractice and product liability -- that are also widely cited as having experienced a pattern of wild damage inflation. These non-libel torts often involve extensive economic injury and severe long-term physical debilitation. Nonetheless, libel actions against the media which rarely entail substantial economic loss, and even less frequently have provable physical impact, were found to yield higher average damage awards. The average damage award in medical malpractice actions for the period 1980-84 was slightly in excess of three-quarters of a million dollars. (When million-dollar malpractice awards were excluded this figure dropped to

under a quarter of a million dollars.) The average damage award in product liability actions for that same period was just under a million dollars. (When million-dollar product liability awards were excluded this figure dropped to just over a quarter of a million dollars.) Jury Verdict Research, Inc., Injury Valuation Reports: Current Award Trends, No. 304 (1986) at 18-19.

As for the frequency of million-dollar awards in these comparison areas, between 1980 and 1984 million-dollar awards were entered in 24% of product liability cases -- under the 25% frequency in media libel actions. The frequency of million-dollar awards in medical malpractice actions was lower still -- 21% during the same period. Id.

In contrast to the notable frequency with which punitive damages are being awarded against the media in libel actions, a recent study indicates that during a period ranging from 1981 to 1984 punitive damages were awarded in a relatively low percentage of all civil cases involving an award of money damages. In two-thirds of the thirty-two reporting locations winning plaintiffs were awarded punitive damages less than 10% of the time. In New York City, Chicago and Los Angeles, for example, punitive damages were awarded in 1.6%, 2.2%, and 8.6% of the cases in which money damages were awarded, respectively. Imposition of punitive damages ranged from 0% in some locations to a maximum of 21.6% in the county with the highest rate of punitive awards. All locations

reported lower percentages than the recent average for punitive awards in media libel actions. Daniels, Punitive Damages: The Real Story, 72 ABA Journal 60 (August 1, 1986).

APPENDIX B --

Recent Million-Dollar Awards in Media Libel, Privacy and Related Cases and their Disposition*

1. Beckham v. Sun News (S.C. 1986) -- $1.0 million (compensatory damages), $2.5 million (punitive damages), $3.5 million (total damages); reversed and remanded.

2. Brown & Williamson v. Jacobson (Seventh Cir. 1983) -- $3.0 million (compensatory damages), $2.05 million (punitive damages), $5.05 million (total damages); post-trial motions pending.

3. Burnett v. National Enquirer (Cal. 1981) -- $0.3 million (compensatory damages), $1.3 million (punitive damages), 1.6 million (total damages); award reduced post-trial to $800,000; further reduced on appeal to $150,000.

4. Costello v. Capital Cities Communications (Ill. 1985) -- $0.45 million (compensatory damages), $0.6 million (punitive damages), $1.05 million (total damages); intermediate appeal pending.

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* Based upon data compiled and published by the Libel Defense Resource Center, New York, New York.

5. Cramlet v. Multimedia Program Productions, Inc. (Tenth Cir. 1983) -- $1.7 million (compensatory damages), $4.2 million (punitive damages), $5.9 million (total damages); remanded for new trial on damages.

6. Douglas v. Hustler (Ill. 1983) -- $0.5 million (compensatory damages), $2.0 million (punitive damages), $2.5 million (total damages); reversed and remanded.

7. Edghill v. Philadelphia Magazine (Pa. 1983) -- $2.0 million (compensatory damages), $5.0 million (punitive damages), $7.0 million (total damages); post-trial motions pending.

8. Fletcher v. San Jose Mercury News (Cal. 1986) -- $1.01 million (total damages); post-trial motions pending.

9. Green v. Alton Telegraph Printing Co. (Ill. 1982) -- $6.7 million (compensatory damages), $2.5 million (punitive damages), $9.2 million (total damages); no appeal taken, and case reportedly settled for more than $1 million, because defendant financially unable to obtain appeal bond.

10. Guccione v. Hustler (Second Cir. 1985) -- $1 (compensatory damages), $1.6 million (punitive damages), $1.6 million (total damages); appeal pending.

11. Guccione v. Hustler Magazine (Ohio 1981) -- $3.3 million (compensatory damages), $37.0 million (punitive damages), $40.3 million (total damages); damage award reversed by intermediate appellate court.

12. International Security Group v. The Outlet Co. (Tex. 1983) -- $0.6 million (compensatory damages), $1.0 million (punitive damages), $1.6 million (total damages); award reduced post-trial to $850,000. Appeal denied by highest state court.

13. Kerr v. El Paso Times (Tex. 1984) -- $0.5 million (compensatory damages), $3.0 million (punitive damages), $3.5 million (total damages); reversed and dismissed by intermediate appellate court.

14. Lerman v. Flynt Distributing Co. (Second Cir. 1980) -- $7.0 million (compensatory damages), $33.0 million (punitive damages), $40.0 million (total damages); award reduced post-trial to $10,000,000; reversed and dismissed.

15. Levine v. CMP Publications (Fifth Cir. 1983) -- $1.009 million (compensatory damages), $0.5 million (punitive damages), $1.509 million (total damages); award reduced post-trial to $300,000.

16. Lipscomb v. Richmond News (Va. 1983) -- $1.0 million (compensatory damages), $0.045 million (punitive damages), $1.045 million (total damages); award reduced post-trial to $100,000.

17. Locricchio v. The Evening News Association (Mich. 1985) -- $3.0 million (compensatory/total damages); post-trial motions pending.

18. Machleder v. Diaz (Second Cir. 1985) -- $0.25 million (compensatory damages), $1.0 million (punitive damages), $1.25 million (total damages); appeal pending.

19. McCoy v. The Hearst Corp. (Cal. 1979) -- $3.0 million (compensatory damages), $1.56 million (punitive damages), $4.56 million (total damages); affirmed by intermediate appellate court; further appeal, granted by highest state court, pending.

20. Miskovsky v. Oklahoma Publishing Co. (Ok. 1980) -- $0.035 million (compensatory damages), $0.965 million (punitive damages), $1.0 million (total damages); reversed and dismissed by highest state court.

21. Postill v. Booth (Mich. 1980) -- $0.3 million (compensatory damages), 0.7 million (punitive damages), 1.0 million (total damages); reversed and dismissed by intermediate appellate court.

22. Pring v. Penthouse International (Tenth Cir. 1981) -- $1.51 million (compensatory damages, $25.025 million (punitive damages), $26.535 million (total damages); award reduced post-trial to $14.035 million; reversed and dismissed on appeal.

23. Rayzor v. A.H. Belo Corp. (Tex. 1981) -- $1.0 million (compensatory damages), $1.0 million (punitive damages), $2.0 million (total damages); reversed and dismissed by intermediate appellate court.

24. Re v. Wilmington News Journal (Del. 1983) -- $1.3 million (compensatory/ total damages); damages set aside as excessive by highest state court and remanded.

25. Rogers v. Doubleday (Tex. 1982) -- $2.5 million (punitive/total damages); affirmed by intermediate appellate court; then reversed and dismissed by highest state court.

26. DiSalle v. Pittsburgh Post Gazette (Pa. 1985) -- $0.21 million (compensatory damages), $2.0 million (punitive damages), $2.21 million (total damages); post-trial motions pending.

27. Sisler v. Gannett Co. (N.J. 1983) -- $1.05 million (total damages); affirmed by intermediate appellate court; further appeal pending.

28. Sprague v. Philadelphia Inquirer (Pa. 1983) -- $1.5 million (compensatory damages), $3.0 million (punitive damages), 4.5 million (total damages); reversed and remanded.

29. Tavoulareas v. Washington Post Co. (D.C. Cir. 1982) -- $0.25 million (compensatory damages), $1.8 million (punitive damages), $2.05 million (total damages); reversal of judgment n.o.v. vacated; rehearing en banc pending.

30. Thomson v. Combined Communications, Corp. (Ky. 1985) -- $2.6 million (compensatory damages), $0.3 million (punitive damages), 2.9 million (total damages); post-trial motions pending.